30	days notice
120	days review
90	days additional review
240	days total

NATOA would leave the increase further stayed during any appeal to the FCC. Considering the Commission's well-known limitations on staff, and expected delays, virtually every contested rate increase would be delayed indefinitely--even if the city did not invoke the power it requests to "freeze" rates.

In the meantime, every month which passed would be revenues foregone by an operator held captive by process. The franchising authority would be immune from liability in damages. The "actual subscribers" (to whom NATOA expresses such loyalty elsewhere) would have relocated, disconnected, changed service level, etc; and the then current subscribers would be less than understanding in receiving requests for payment of a retroactive surcharge to make up for months (sometimes years) of past rate increases that should have been in effect had the franchising authority not suspended them. What would have been a 5% increase might become a far less palatable 15% increase, with resulting disconnections.

Nor has NATOA made any effort to accommodate the genuine cash flow needs of operators faced with bank covenants and operating costs. The delayed implementation proposed by NATOA is an undisguised effort to import into the benchmark process the very delays and procedural complications incident to classical utility regulation, which both the Act and the Commission's Notice seek to avoid.

2. Paperwork

NATOA also proposes that every rate adjustment proposed by an operator not only be announced to customers -- a proposal with which we agree -- but that the operator provide to each customer a care package explaining the mechanics of lodging rate complaints, providing the background benchmark comparisons, and enclosing the necessary FCC complaint forms. All that is omitted is a complete copy of the Act, the rules and a prepaid return envelope. The amount of paper which would be needlessly generated by such mailings would dwarf the filings in these Cable Act rulemakings, without substantial benefit. Surely if a rate increase is considered objectionable to a community, one or more members will lodge a complaint. CR&B fully anticipates a thriving municipal consulting business offering turnkey rate complaints to franchising authorities on NLC's or M&H's mailing list. There is no reason to exacerbate the problems with redundant mailings. Sec. 76.607 already provides each customer with a contact person for complaints. NATOA's proposal would create wasteful, duplicative paperwork and generate form complaints.

3. Complaint Records

NATOA also proposes that every rate complaint received by an operator be retained and made available for municipal inspection. Verbal complaints received by customer service representatives are typically not reduced to paper records, but are entered into the customer's electronic file. That file also contains personally identifiable information. Disclosure is restricted by Sec. 631 of the Act, as the Commission recognized in adopting Rule 76.607. Cable Television Technical and Operational Requirements, MM Docket 91-169, Mimeo 30740 at ¶39 (Nov. 10, 1992). In addition, the receipt of complaints about rates does not evidence violation of rule. The more traditional manner for a city to determine satisfaction with cable service is to rely upon constituent complaints to the franchising authority, which is the underpinning of Rule 76.607. Franchising authorities also have recourse to public meetings, and even surveys, if they wish to judge subjective satisfaction. However, the purpose of the rate regulations should be to import objectivity into the rate process, and not revert to a system of rate regulation based upon emotion and popularity, or to create incentives for the artificial generation of complaints.

4. <u>Marketing Materials</u>

NATOA suggests that every piece of sales literature include a reference to the availability of broadcast basic. Such a rule would disable systems from using nationally generated promotions (such as those by HBO and Showtime), and restrict an operator's ability to promote any particular special, such as a new package associated with a free installation. So long as customers are provided annual notice of the availability of broadcast basic, there should not be such a restraint on marketing material.

5. <u>Proprietary Information</u>

NATOA envisions a local procedure in which any adjustment of rates must be accompanied by a cost of service justification, and where any franchising authority could open a rate case and demand open access to all underlying cost data, particularly proprietary affiliation agreements. CR&B submits that this approach is an artifact of conventional utility ratemaking, and that access to such records is unnecessary for any system which is proposing a price within benchmarks. If an operator seeks to exceed benchmarks, then the operator must be prepared to provide access to cost information. But the franchising authorities (like the FCC in tier complaints) must likewise be prepared to extend confidentiality to proprietary and personal information. We set forth a workable method in our

Comments. The proposal by NATOA is not workable, because it subjects all submissions to open public disclosure whenever state open records laws require it. The Reporters Committee publishes volumes demonstrating just how open are records submitted to state governments under state law. Austin openly demands that "the public ... must have full access" (p.65) to such information. By contrast, the Commission is charged with the responsibility of formulating standards and guidelines, both procedural and substantive, for basic service regulation. It must use that authority to create a uniform system of confidentiality which may be relied upon by companies which operate nationwide under nationwide contracts and nationwide basic rate standards. Operators should be afforded the protections of FCC/FOIA limitations when submitting materials to local governments. Those certified governments will have committed to following federal law in their rate processes, and should afford federal protections.

6. Remedies

NATOA also proposes that an operator who errs in its rate computation is automatically guilty of substantially violating a material term of the Act, is apparently foreclosed from remedying it, and must therefore be disqualified from franchise renewal. That makes the stakes of every rate adjustment extraordinarily and needlessly high. Congress specifically provided that erroneous rates do not violate the Communications Act. H. Rep. 88. Capital punishment is inappropriate for honest disagreements in applying a new and difficult set of regulations, particularly when only one party is subject to penalty and the other has been immunized. CR&B's earlier proposal for adjustment and refunds of overcharges is far more commensurate with the "offense," fully reimburses the customers, and avoids making every disagreement a capital crime.

7. Standard of Review

NATOA also requests that every decision made by a franchising authority be afforded the deference of the "arbitrary and capricious" review standard given to expert agencies. The FCC would be forbidden from determining facts *de novo* or from applying its acknowledged expertise. This proposed standard is upside down. Franchising authorities have no background or qualifications as expert agencies in determining effective competition or in administering the complex formulae proposed by the Cities. They have demonstrated in every one of the Commission's Cable Act rulemakings that they are zealous advocates without particular regard for the cost or consequences of their proposals. They are certainly not the impartial judges to whom deference may be granted. Moreover, because they are immunized from liability in damages, they have been released from the ordinary incentives for fairness or accuracy which should characterize an expert.

D. Grandfathering

Austin suggests that the "Dubuque exception" in Section 623(j) -- which grandfathers rate agreements in place on July 1, 1990 if the community had fewer than 3 off-air signals -- should be expanded by Commission fiat to cover all rate agreements regardless of date and circumstances; all agreements to deliver particular services; and that grandfathering works only one way, at the option of the city. The Act limits the Dubuque exception virtually to Dubuque. 138 Cong. Rec. H. 6506 (July 23, 1992). It does not extend beyond the codified cutoff date, nor does it legitimize agreements to provide specific video services which were unlawful (under Section 624) when imposed.

V. CABLE PROGRAMMING SERVICES

A. Tier Complaint Standards [¶91-96]

CFA, NATOA, and NAB have agreed among themselves that there is no difference between basic and tier regulation under the Act and that no cable rates -- including tier rates -- may be measured by reference to existing market rates. This construction makes a mockery of the statute.

- The plain language of Section 623(c)(2)(A) directs the Commission to existing market rates in evaluating tier complaints. Indeed, an operator's comparison with his peers is the first criteria specified by Congress.

o That comparison is perfectly sensible. Congress found that even when totally deregulated, only a minority of cable operators had abused pricing freedom over tiers. The purpose of tier regulation was to "reign in the renegades." There is a vast difference between that directive and NATOA's presumption that all satellite tier rates reflect abusive prices which must be reduced.

o Congress specifically considered and rejected a version of the bill which would have exposed the most popular tier to the same regulatory benchmark as basic. The Conference rejected the Senate version of 623, and with it the construction of the bill on which the cites (e.g., Austin, p.24) rely for their strained construction.

o Congress assigned basic regulation and tier regulation to different jurisdictions, under different standards described in different subsections of the Act. Although CFA is reluctant to admit it, Congress clearly believed that satellite tier programming, and the development of cable itself, had been propelled by the deregulation of rates. H. Rep. 29. It was not prepared to submit that engine of national innovation to the basic rate formula applied by local governments. It allowed only the FCC to identify the minority of bad actors who abused tier prices and bring them into line with their peers.

o Austin's contention that the Hope/Bluefield standard of utility regulation, cost-of-service accounting, cost manuals and a uniform system of accounts is the best way to regulate tiers probably best reflects the disregard which franchising authorities have for the statute. Such utility style regulation is precisely what Congress asked the FCC to avoid even in basic regulation. Instead, Congress provided the Commission with a balanced set of tools, including basic rate regulation and procedures to resolve complaints about satellite tier pricing by "bad actors," with specific instructions to stay "uncomplicated," to avoid cost allocation manuals and Title II regulation. See, e.g., H. Rep. 83. To apply utility style regulation to tier regulation turns the Act on its head.

Nor is there any practical need to apply the same standards to basic and tier. By comparing basic service rates with comparable rates in markets which have sustained effective competition, the Commission will assure those subscribers who subscribe only to basic the same rates which would apply in competitive markets. By applying broader market standards, and comparing satellite tier rates to comparable rates of comparable systems, customers will be assured that even optional services will not be abused by bad actors.

The best method for combining these approaches is the "B2" method described by NCTA. Customers are required by the Act to buy through basic to reach satellite tier. The combination of basic rates, satellite tier rates, and the package of equipment needed to receive the combination can readily be measured against the applicable basic benchmark, satellite tier benchmark, and equipment cost cap, in a simple, straightforward analysis. Such an approach presents remarkable advantages, far superior to the cost of service models proposed by NATOA. It applies competitive benchmarks to basic service rates. It simplifies administration of tier and equipment rate regulation by applying the sum of applicable benchmark to the sum of the regulated prices involved. It also permits the discounting of broadcast basic service, to the advantage of existing basic only subscribers and to the ultimate benefit of the 40% of television households who do not yet subscribe but may be attracted by reduced rates. By looking at the discounted basic rate before judging tier prices, it eliminates the risk of tier complaints which would otherwise discourage such discounting.

To take the NATOA approach -- in which both basic and tier prices are to be evaluated on a pure cost-of-service basis -- would not only sacrifice these benefits, but would accentuate the constitutional problems looming over the rate proposals of NATOA and CFA. CR&B submits that every level of service is constitutionally entitled to the opportunity to earn a nonconfiscatory return, free of compulsory subsidies. But the Cities, CFA, and others clearly want both basic and tier to be deeply discounted. As noted above, the Commission may stimulate the discounting of basic with a B2 approach. But it is not realistic to assume, with NATOA (p.8, n.2) or CFA (p.74), that pay television can pick up the economic and constitutional slack left by deeply discounted tiers. There has been a well documented steep decline in pay penetration. It is this loss, primarily due to the popularity of home video and the growth and development of satellite cable networks, which accounts for the dramatic drop in the contribution of pay to overall revenues. CFA is indulging in the most uninformed speculation to assume that a drop in pay penetration reflects pricing abuses on basic. Wishing that cable can be sustained by pay revenues will not make it so, and the regulations cannot be premised on such fantasy.

The notion that the distinct complaint process, standards, and goals of 623(c) are merely a phrasing difference in what is substantively the same law as 623(b) does the grossest disservice to the statute. It would also undo the marketplace for programming innovation. CR&B can understand why NAB would seek to destroy its satellite competition. We cannot understand why CFA would savage the programming marketplace by removing the rewards traditionally given for creative productions which win popular following. It feigns a willingness to deliver appropriate rewards for such innovation but would have the Commission saddle cable with returns below even the competitive market, and then subject cable to further reduction to "cost of service" standards.

B. Complaint Procedures

NATOA and Austin propose a 90-120 day period within which complainants could object to satellite tier rate increases -- an extremely long period for a rate adjustment to be clouded. The average subscriber will have paid three or four months of the increase during the interim, and franchising authorities will have had more than ample notice of a change. There is no reason to suppose that franchising authorities and concerned subscribers cannot respond more quickly and move the dispute resolution process along.

NATOA's further suggestion of a ten month review period is even more distorted that its proposed basic service procedures, and would import even more needless delays into the process.

NATOA's insists that cable operators locate and rebate the "actual" subscribers who overpaid, rather than make adjustments prospectively for that class of subscribers. The suggestion has no basis in the statutory language, and imposes unnecessary regulatory costs which will unavoidably be visited on those same subscribers.

VI. UNIFORM RATE STRUCTURE/DISCRIMINATION

A. Negative Option/Evasion [¶119-121, ¶127]

Municipal efforts to twist the meaning of the Act are perhaps no more obvious than in NATOA's and Austin's proposed evasion rules. While CFA recognized that a revenue neutral price restructuring among services is neither a negative option nor an evasion, NATOA insists that such actions require thorough rate review, governmental approval, mandatory downgrade of customers to the new lowest basic and affirmative assent of all subscribers to restore their original level of service. Austin makes the same request, citing as authority only the Senate's discussion of the defeated provision giving the cities jurisdiction over the most popular tier. The disincentives such extremism imports into the cable business are described in our Comments.

Austin goes still further. It considers evasion to include any addition of programming to a tier if coupled with a rate increase; and any decrease in customer service or signal quality, or the removal of any programming from a tier without a corresponding rate reduction. This ignores the jurisdiction the FCC has over technical standards; the customer service rules and limitations to be established in MM Docket 92-263; Section 623(b)'s continuing restriction against franchising authorities tampering with the selection of particular video services; and specific instruction at Conf. Rep. 65 that changes in programming mix within a tier are exempt. Such proposals would freeze operators in their tracks and subject every editorial decision to the veto of a few.

NATOA would also treat any retiering since October 5, 1992, as evasion, when the Act's evasion standards themselves do not become effective until April 3, with rollbacks beginning not earlier than the date of complaint. Congress could have but did not adopt a freeze, limit, or other restriction on cable operations during the interim. NATOA has demonstrated nothing insidious about conventional first of the year price adjustments.

Such displays of municipal overreaching are the best evidence that franchising authorities cannot be entrusted with the responsibility to adjudicate claims of evasion. They seek to construe the clause as a universal solvent melting away all the restraints Congress placed upon them and as a tool for imposing on cable limitations which Congress chose not to adopt.

B. Small System Exception [¶128]

The importance of the Commission's adoption of a small system exception is illustrated by the example of Grassroots Cable Systems. Grassroots serves very small, remote communities in Maine left unserved for 18 years by other operators. It does so under a negotiated rate schedule in which rates increased depending upon the homes-per-mile density to which the community wanted the system built. For example, by negotiated franchise, service would be $19.95 for a density of 20.1 HPM; $21.95 for 18.1-20.0 HPM, and $24.25 for 15.0-18.0 HPM. In reliance on these small system agreements, Grassroots has built down to 12.8 homes-per-mile. Grassroots' entire financial structure would be upended if this delicate balance is subjected to post hoc regulation inconsistent with the negotiated schedule.

VII. LINE ITEMIZATION SHOULD SEPARATE FRANCHISE FEES AND COSTS FROM THE CHARGE FOR CABLE SERVICE [¶175]

CR&B's Comments are accompanied with a subscriber invoice from Bell Atlantic's C&P Telephone, requesting payment of $26.00, after itemizing $16.54 for monthly service, and separate line item charges for 911, the SLC surcharge, the Virginia Relay Center surcharge, federal taxes, and local taxes. NATOA requests that cable be denied a comparable right, and asks that franchise fees be buried in the monthly service charge and disclosed, if at all, only under rules established by the local franchising authorities, who would also demand itemization of confidential program affiliation charges, cash flow, and profit.

The Commission is witnessing the cities' flight from political accountability to their constituents. The entire purpose of line itemization is to provide voters with fair disclosure of the hidden taxes assessed through the franchising process. Burying the charges in the bill deflects the very accountability intended by Congress. It also denies cable the very rights now exercised by Bell Atlantic, who already offers video transport services and seeks to overbuild the cable operator in the very community for which its invoice originated.

Line itemization also harmonizes marketing with billing. In order to use mass media covering multiple communities, it is necessary to advertise "$20 plus franchise fee." The clearest invoice would reflect the same price.

NATOA's request (p.60 n.28) to control the "format and content" of sales information provided by cable is a backdoor effort to extend its hatred of itemized taxes into a gag order on truthful advertising. Whatever is done on the invoice, the Commission must clarify that cable operators are free to tell subscribers the truth about franchise fees in other media, without municipal gag orders.

CONCLUSION

The Commission should adopt regulations consistent with CR&B's Comments and Reply.

Respectfully submitted,

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Frederick Cablevision, Inc.
Gilmer Cable Television Company, Inc.
Grassroots Cable System
Halcyon Group, Inc.
OCB Cablevision, Inc.
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